91-122

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

v.

RENE ALBERTO RODRIGUEZ, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Whether a procedural due process claim is stated under 42 U.S.C. § 1983 when high-level state officials exercise broadly delegated power and authority to effect a deprivation of a property interest, notwithstanding their duty to implement procedures to prevent the deprivation.

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, PFZ Properties, Inc. ("PFZ"). PFZ was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

(1) Rene A. Rodriguez, in his individual capacity;
(2) Salvador Arana, in his capacity as Administrator of the Regulations and Permits Authority of the Commonwealth of Puerto Rico; and
(3) the Regulations and Permits Authority of the Commonwealth of Puerto Rico.

Petitioner PFZ Properties, Inc. is a privately held corporation and has no publicly owned parent, subsidiary or affiliate.

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v.

RENE ALBERTO RODRIGUEZ, et al.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner PFZ Properties, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on March 18, 1991 and the order denying a rehearing entered on April 23, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") is reported in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), and is reprinted in the Appendix at A-1. The order of the Court of Appeals denying rehearing is not reported. That order is reprinted in the Appendix at A-11. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court") in *PFZ Properties Inc. v. Rodriguez*, 739 F. Supp. 67 (D.P.R. 1990). The District Court's opinion and order is reprinted in the Appendix at A-13 (hereinafter "App. at ___").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on March 18, 1991. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on April 23, 1991. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case, 42 U.S.C. § 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Procedural History

This case arises out of a dispute over the development of a large residential and tourist project in the Commonwealth of Puerto Rico. Petitioner's complaint was filed in December 1987 in the District Court under 42 U.S.C. § 1983. An amended complaint was filed in October 1988. The amended complaint alleged, *inter alia*, that the respondents Rene Rodriguez and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE" or "the Agency") had violated petitioner's rights to procedural and substantive due process under the Fourteenth Amendment. Petitioner's amended complaint alleged deliberate misconduct by ARPE and Rodriguez, the former Administrator of ARPE. Accordingly, Rodriguez was sued in his individual capacity. Because injunctive relief was sought from ARPE, the current Administrator of the Agency, Salvador Arana, was sued in his official capacity.

Discovery was completed and the final pretrial order was entered in December 1989. Following the entry of the same, the District Court granted a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. The Court of Appeals affirmed the dismissal on March 18, 1991. Petitioner sought a rehearing, which request was denied on April 23, 1991.

Facts Material to the Questions Presented

PFZ owns a large tract of land in Puerto Rico in an area known as Vacia Talega. In May 1976, the Planning Board of Puerto Rico adopted a resolution approving a development project for this parcel which had been submitted by PFZ. The Planning Broad is the Commonwealth agency which has discretionary authority to make [illegible]-specific land use decisions in Puerto Rico. According to the resolution approving the project, development was to proceed in two phases, the first of which was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units. Controversy surrounding the project led to a

challenge of the Planning Board approval in the Puerto Rican courts. The Superior Court of Puerto Rico, nonetheless, affirmed the Planning Board's resolution in September 1977. In January 1978, the Supreme Court of Puerto Rico declined to review the Superior Court's decision.

PFZ thereupon timely submitted plans for the development of the first phase of the project to ARPE, another agency of the Puerto Rican government. ARPE approves development plans consistent with Planning Board resolutions. It also issues construction permits based upon construction drawings submitted by developers consistent with approved development plans. ARPE's permit issuing functions are ministerial in nature.

In February 1981, ARPE approved PFZ's development plans by formal resolution. Accordingly, in February 1982, PFZ timely filed construction drawings with ARPE for the first section of the project. This triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit. In March 1982, ARPE confirmed to PFZ in writing that it had received the construction drawings and sent them to its regional office for processing. Years of delay ensued until PFZ inquired by letter in January 1986 directly to the new Administrator of ARPE, Lionel Motta, about the status of its drawings. Motta directed his subordinates to investigate the matter.

As a result of that investigation, and consistent with ARPE's ordinary procedures, a letter officially notifying PFZ of the status of its drawings and additional information required to complete their processing was prepared and signed by Motta on behalf of ARPE in February 1987. Motta retired two days later. His subordinates, however, never sent the notice letter to PFZ or notified it of the action taken.

Motta was succeeded as Administrator by respondent Rene Rodriguez. As a political appointee, he served at the pleasure of the Governor. In the wake of Motta's retirement, Rodriguez and his senior deputies embarked upon a deliberate, orchestrated course of inaction to delay indefinitely the processing of PFZ's drawings and the issuance of the construction permit. During the remainder of 1987, these senior ARPE officials, acting under the personal direction of Rodriguez, prevented the processing of PFZ's drawings and

refused to respond to written and verbal inquiries regarding their status. Consistent with this conduct, when Rodriguez was advised of the existence of the February 1987 notice letter, he ordered a senior deputy to remove it from the project file and give it to his secretary to conceal in a locked file cabinet to which only she and Rodriguez had access.[1]

In December 1987, the president of PFZ had an informal, private conversation with Amadeo Francis, a Special Advisor to the Governor of Puerto Rico. Francis ostensibly had no official responsibilities with respect to ARPE functions. He revealed, nonetheless, that the Governor had determined some time before to keep the project from going forward for personal and political reasons, and that the project would not be resolved on the merits. This was wholly inconsistent with the status of the project. The matter was beyond any stage of policy review and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for review.

Based on Francis' information and the continued stonewalling by ARPE, PFZ filed its original complaint in the District Court on December 28, 1987. The complaint alleged that ARPE's continued refusal to process the construction plans and issue the associated permits constituted a violation of PFZ's rights to due process.

In August 1988, without prior notice or opportunity to be heard, PFZ was informed by ARPE that it would not receive a construction permit, because its project had ceased to have effect. ARPE also advised PFZ that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. The decision was ostensibly premised on a finding that PFZ had not submitted any construction drawings. In fact, senior ARPE officials, including the Deputy Administrator and the Assistant Administrator for Regional Operations, acting on instructions from Administrator Rodriguez, had conducted a sham review in which they deliberately reviewed the

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[1] The existence of the notice letter was not discovered by PFZ until the deposition of Rene Rodriguez in June 1989. In his deposition, Rodriguez acknowledged that the execution of the letter was an official act which should have been carried out. Its contents were not revealed until a copy was produced by ARPE just before the close of discovery in November 1989. The letter is discussed in the District Court opinion, but not in the opinion of the Court of Appeals. App. at A-16.

wrong file.[2] They then concluded that the construction drawings had never been submitted, so no permit could issue. At the direction of the Administrator and with the knowledge and acquiescence of his senior subordinates, it was also determined that the decision to deny the project would be made without providing a predeprivation hearing. This decision was inconsistent with customary ARPE practice and procedure.

PFZ requested reconsideration of the decision. Administrator Rodriguez personally directed the reconsideration and responded on behalf of ARPE, denying the request. PFZ petitioned for review of ARPE's decision in the Superior Court and Supreme Court of Puerto Rico. Review in both courts was discretionary and, if granted, limited by statute exclusively to issues of law.[3] The petitions for review were denied by the Puerto Rican courts.

PFZ filed its amended complaint in federal district court in October 1988, alleging that the respondents' deliberate misconduct in denying the project and continuing to refuse to process the construction drawings deprived PFZ of its rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. Following the completion of discovery, respondents moved to dismiss the amended complaint.

The District Court granted the motion to dismiss the amended complaint. In doing so, it held that the post-deprivation administrative and judicial process afforded to PFZ under Puerto Rico law was constitutionally sufficient for purposes of procedural due process. It also held that PFZ had failed to state a claim for violation of its rights to substantive due process, in light of the view repeatedly expressed by the First Circuit that controversies involving rejections of land development projects and denials of building permits cannot rise to the level of substantive due process violations. The Court of Appeals affirmed on essentially the same grounds.

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[2] During the course of the briefing in the District Court, respondents admitted the error, but asserted it was unintended. Petitioner alleged it was deliberate, which allegation was amply supported by the record in the case.

[3] *See* 23 L.P.R.A. Section 72d. App. at A-28.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN *ZINERMON V. BURCH* WHEN HIGH-LEVEL STATE OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF

PFZ's complaint alleged denial of its rights to procedural due process by the former Administrator of ARPE and senior ARPE officials acting on behalf of the Agency. In particular, it claimed the right to a predeprivation hearing before its project was denied. The Court of Appeals' decision below was thus properly premised on an analysis of the issue of "whether there was adequate process."[4] The Court's analysis relied principally upon *Parratt v. Taylor*, 451 U.S. 527 (1981). Citing *Parratt*, the Court concluded that PFZ was not entitled to predeprivation process, because the deprivation of its property interest was alleged to have resulted from an illegal departure by state officials from prescribed procedures. Opinion App. at A-5.

The Court of Appeals, however, failed to address the fact that it was the senior officials of the Agency, including the Agency Administrator, who personally effected the deprivation complained of. These high-level officials were not only authorized to effect the deprivation complained of, but they were also charged with responsibility to see that appropriate process was provided to PFZ to

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[4] Procedural due process requires two inquiries: (1) whether there is a property interest and (2) whether there was adequate process. *Logan v. Zimmmerman Brush Co.*, 455 U.S. 422, 428 (1982). With respect to the first inquiry, the Court of Appeals presumed PFZ possessed a property interest for purposes of its analysis. Because the Court of Appeals assumed the existence of a protected property right, predeprivation process was paramount. *Zinermon v. Burch*, 494 U.S. ___, 110 S. Ct. 975, 984 (1990); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

prevent the deprivation.[5] As such, the Court of Appeals' reliance on Parratt was misplaced and its decision is inconsistent with the Supreme Court's more recent decision in *Zinermon v. Burch*, 494 U.S. ___, 110 S. Ct. 975 (1990). *Zinermon* found that *Parratt* did not control when state officials are given broad discretionary power and authority to effect the deprivation complained of and have a duty to prevent the same.[6] As is more fully explained *infra*, the opinion below is also inconsistent with other circuit court decisions which have specifically found that *Parratt* does not apply when *high-ranking* state officials use their state-delegated authority to effect a deprivation if they had the power to provide a hearing before they did so. *See* discussion at 10-11.

The Supreme Court has consistently held that fundamental and elementary requirements of procedural due process require that any deprivation of a protected property interest ordinarily be preceded by notice and a meaningful opportunity to be heard.[7] *Zinermon v. Burch*, 494 U.S. at ___, 110 S. Ct. at 984. *Parratt* represents a narrow departure from that preferred approach which has been recognized by the Supreme Court. The *Parratt* rule provides that post-deprivation remedies are all the process that is due, if they are the only remedies the state could be expected to provide. 451 U.S. at 541. In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently lost his mail. *Id.* at 543-44. The Supreme Court concluded that the "random and unauthorized" nature

[5] ARPE provided predeprivation process to similarly situated proponents of approved projects under its customary practices and procedures

[6] Though argued at length in the petitioner's briefs below, *Zinermon* is not discussed in the Court of Appeals' opinion.

[7] Government interests may excuse the failure to provide predeprivation process if the government demonstrates that there are "extraordinary situations" that require speedy state action or that make the provision of predeprivation process impractical or burdensome. *Zinermon*, 494 U.S. at ___, 110 S. Ct. at 984, *citing Logan*, 455 U.S. at 436. ARPE proffered no extraordinary circumstances necessitating quick state action in PFZ's case and there were none. Moreover, the case had been pending 6 years without any concern by the Agency for quick action. Furthermore, because ARPE ordinarily provided predeprivation process under its customary practice and procedures, the Agency could not and did not claim that predeprivation process was impractical or burdensome.

of the loss of property made it impossible for the state to predict such deprivations and thus provide predeprivation process. Accordingly, post-deprivation remedies were all the process that was due. *Parratt*, 451 U.S. at 541. *See also Zinermon v. Burch*, 494 U.S. ___, 110 S. Ct. at 985-86 (discussing the *Parratt* rule).[8]

The Supreme Court extended the Parratt reasoning to certain intentional deprivations of property in *Hudson v. Palmer*, 468 U.S. 517 (1984). That case involved the alleged deliberate and malicious destruction of a prison inmate's legal papers by a prison guard. In *Hudson*, as in *Parratt*, the court found that the state official was not acting pursuant to any established state procedure, but instead was pursuing a "random and unauthorized" act. The Court pointed out that the state could no more anticipate and control in advance such "random and unauthorized" intentional conduct of its employees than it could anticipate similar negligent conduct. *Id.* at 533. Accordingly, post-deprivation remedies were adequate.

The Court of Appeals' reliance on *Parratt* implicitly assumed that, because the respondents did not act in accordance with ARPE's established procedure, their actions were "random and unauthorized." *Zinermon*, however, forecloses such an assumption. As the Supreme Court explained, actions by state officials cannot be "random and unauthorized" if the state has delegated to them broad power and authority to effect the deprivation complained of and they also have a duty to implement procedural safeguards to prevent the deprivation. 494 U.S. at ___, 110 S. Ct. at 989-90.

In the petitioner's case, it was the Administrator of the Agency and his senior deputies who deprived PFZ of its protected interest through the use of their official station. The Commonwealth had thus delegated to Rodriguez and his senior deputies the power and authority to effect the very deprivation complained of. At the same time, those high-level officials had a duty to implement ARPE's

[8] *Parratt* is actually a special application of the second factor of the three-part analysis of procedural due process identified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Zinermon*, 494 U.S. at ___, 110 S. Ct. at 985. The second factor in the *Mathews* test provides that the Court must weigh the risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. 424 U.S. at 335.

customary practices and procedures by providing a predeprivation hearing. As such, their conduct was not "random or unauthorized." *Id.* The personal involvement of the Agency Administrator carried with it the endorsement of the state apparatus. At all times, Rodriguez exercised the broad and uncircumscribed authority conferred upon him as the Administrator of the agency to orchestrate and control the process through which PFZ's construction drawings were reviewed and its property interest was deprived. The state employees in *Parratt* and *Hudson* had no similar broad, delegated authority to deprive prisoners of their property, and no similar duty to initiate required procedural safeguards before deprivation occurred.

Zinermon's facts did not present the specific question of when, if ever, actions of the head of a state agency which effect a deprivation would constitute "random and unauthorized" conduct such that *Parratt* would apply. However, *Zinermon* did appear to validate the analysis of prior circuit decisions which had focused on the power and authority delegated to high-level officials in determining that their conduct was not "random and unauthorized" within the meaning of *Parratt*. *Zinermon*, 494 U.S. at ___, n. 2, 110 S. Ct. at 978, n. 2. A number of those circuit decisions directly conflict with the approach of the Court below insofar as it viewed the Agency Administrator's conduct as falling within the scope of *Parratt*. *See, e.g., Wilson v. Civil Town of Clayton*, 839 F.2d 375 (7th Cir. 1988) (officials employed at such high levels of local government that deprivation may have been the result of state procedures established by defendants for purpose of depriving plaintiff of his rights); *Fetner v. City of Roanoke*, 313 F.2d 1183, 1185 (11th Cir. 1987) (injury to property interest resulting from conscious and deliberate act of city's governing board outside the scope of *Parratt*); *Freeman v. Blair*, 793 F.2d 166, 177 (8th Cir. 1986), *vacated on other grounds*, 483 U.S. 1014 (1987) ("decisions made by the highest officials in the executive branch of state government who have final authority over matters for which they are responsible do not constitute 'random and unauthorized acts'"); *Wolfenbarger v. Williams*, 774 F.2d 358, 365 (10th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (official acts initiated and controlled by the chief law enforcement executive for a jurisdiction could not be characterized as "random and unauthorized" and *Parratt* thus did not apply). *See also Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc) ("[t]he *Parratt* analysis, in which the touchstone for predeprivation process is the feasibility of

providing such process, is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the State ordinarily could provide.")

Views conflicting with the First Circuit's decision below have also been expressed by other circuits, which have revisited their jurisprudence with respect to the *Parratt-Hudson* rule in the wake of *Zinermon*. For example in *Caine v. Hardy*, the Fifth Circuit, noting that the controlling constitutional authority had changed in light of *Zinermon*, criticized its own earlier decisions which had applied *Parratt* in circumstances where the official who effected the deprivation was a high-ranking employee charged with providing procedural due process for the claimant. *Caine v. Hardy*, 905 F.2d 858, 861 (5th Cir. 1990). *See also Plumer v. State of Maryland*, 915 F.2d 927, 931 (4th Cir. 1990) (when state government can and does provide a predeprivation hearing and charges its employees with effecting the deprivation complained of, availability of state post-deprivation remedy does not satisfy due process). *Compare Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir. 1990) (en banc), *cert. denied*, ___ U.S. ___, 111 S. Ct. 783 (1991) (although high-ranking state officials may exercise authority and discretion to effect a deprivation, *Zinermon* does not create a *per se* "employee status" exception to Parratt).

In addition, petitioner notes that the Supreme Court has previously granted certiorari and vacated decisions applying *Parratt* from two circuits, remanding for reconsideration in light of *Zinermon*. *See Fields v. Durham*, ___ U.S. ___, 110 S. Ct. 1313 (1990) and *Easter House v. Felder*, ___ U.S. ___, 110 S. Ct. 1314 (1990). In both *Fields* and *Easter House*, the deprivations were predictable and the state could have provided predeprivation process. The deprivations occurred at the hands of state actors who were authorized by the state to take the actions that caused the deprivation. *See generally*, discussion in *Caine v. Hardy*, 905 F.2d at 862.

Petitioner submits that *Parratt* is inapposite and that an analysis indicated by *Zinermon* should govern situations such as the one presented in the case below. The petition should be granted to resolve the conflict in the circuit courts which has been created by the First Circuit's decision and to further explain the extent to which

the *Zinermon* analysis has narrowed *Parratt* with respect to the denial of procedural due process by high-level officials.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO A DEVELOPER CAN EVER CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION

Petitioner alleged that the respondents violated its rights to substantive due process when ARPE, acting at the personal direction of Rodriguez, arbitrarily, capriciously, and illegally refused to process its construction drawings and denied its project. PFZ further alleged that the handling of its project was tainted with fundamental procedural irregularities.

Although the Court of Appeals recognized that petitioner had alleged that respondents "violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved construction drawings," the Court stated that it was constrained to dismiss the case in light of the substantive due process standard that had been set forth in repeated prior pronouncements in the First Circuit. Opinion, App. at A-6-7. The First Circuit standard provides that rejections of development projects and refusals to issue building permits, even if malicious, in bad faith and for invalid or illegal reasons, cannot implicate substantive due process, *unless* the improper motivation is accompanied by the deprivation of *another* specific constitutional right. *See Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983), cited in Opinion, App. at A-6.

The petition should be granted in this case because a significant split in authority exists among the circuits with respect to this issue. At least eight other circuit courts have considered the issue of whether an arbitrary, capricious or illegal denial of a development project or a building permit states a substantive due process claim under § 1983 and have reached an opposite conclusion from the First Circuit. Indeed, the divergence of the First Circuit's view of the appropriate standard from the majority of other circuit courts has

been discussed in a number of circuit decisions. An extensive review of the split in authority is set forth in *Littlefield v. City of Afton*, 785 F.2d 596, 604-07 (8th Cir. 1986),[9] in which the Eighth Circuit joined in the rejection of the First Circuit standard ("We are persuaded by the *almost* unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim") (emphasis added). *Id.* at 607.

In this regard, petitioner notes that the Due Process Clause of the Fourteenth Amendment serves to prevent the state "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (purpose of Due Process Clause is "to secure the individual from the arbitrary exercise of the powers of government" and "to prevent governmental power from being 'used for purposes of oppression.'" As such, § 1983 violations of substantive due process occur when, as in this case, defendants' actions are arbitrary, capricious or illegal. *See Davidson v. Cannon*, 474 U.S. at 348 (plaintiff must allege a deprivation which contains some element of abuse of governmental power). The Supreme Court has not previously read into the Fourteenth Amendment a requirement, with respect to the arbitrary and capricious denial of a development project or a building permit by officials acting under color of state law, that a violation of substantive due process must be accompanied by the deprivation of another constitutional right.

Similarly, the majority of the federal circuit courts have not read such a requirement into the Constitution. Instead, a claim for substantive due process may be stated if a party alleges that a denial of a development project or a building permit was the result of arbitrary, capricious or illegal state action. *See Brady v. Town of*

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[9] The *Littlefield* court identified seven circuit courts, the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh, which had disagreed with the First Circuit approach. These decisions are discussed *infra*. Of these circuits, the Seventh has more recently expressed the view that, in addition to alleging that a decision was arbitrary and irrational, there must be a showing of either a separate constitutional violation or the inadequacy of state law remedies. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). The Second Circuit, on the other hand, apparently has decided to follow those circuits which disagree with the First Circuit approach. *See Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988).

Colchester, 863 F.2d at 216 (substantive due process may be maintained where there is evidence that party was denied building permit due to political animus); *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) (denial of developer's building permits for purely personal or political reasons would constitute violation of developer's substantive due process rights); *Littlefield v. City of Afton*, 785 F.2d at 607 (applicants for building permit stated substantive due process claim when they alleged the city acted arbitrarily and capriciously in imposing a condition in granting permit); *Shelton v. City of College Station*, 754 F.2d 1251, 1256-57 (5th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) (arbitrary deprivation of zoning variance "implicates an invasion of Fourteenth Amendment due process rights"); *Scudder v. Town of Greendale*, 704 F.2d 999, 1002 (7th Cir. 1983) (arbitrary denial of a building permit may be the basis for § 1983 action; decision on the merits found denial of permit was not arbitrary or capricious); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (Fourteenth Amendment claim is properly stated where it alleged either abuse of discretion or caprice in a zoning administrator's refusal to issue a building permit); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (denial of a license because of bias and the desire to avoid competition violates a property owner's substantive due process rights); *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347, 1356 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983) (imposition of requirements not included in the ordinance upon an applicant for a permit violates substantive due process); *Parks v. Watson*, 716 F.2d 646, 653 (9th Cir. 1983) (condition requiring an applicant for a government benefit to forego constitutional right is unlawful if the condition is not rationally related to the benefit conferred). *See also Acorn Ponds v. Incorporated Village of North Hills*, 623 F. Supp. 688, 692-93 (E.D.N.Y. 1985) (allegations of error in application of zoning laws and ordinances, defendants' abuse of power and authority in their positions and delay stated claim under § 1983). *But see New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d at 1481 (in addition to alleging that the decision was arbitrary and irrational, plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) (refusal to issue building permit does not implicate substantive due process in the absence of deprivation of another specific

constitutional right).

In light of the First Circuit's repeated adherence to its standard that substantive due process rights are not ordinarily implicated in situations involving the denial of a development project or a building permit notwithstanding facially sufficient allegations of arbitrary, capricious and illegal conduct, and the acknowledged widespread disagreement with this standard expressed in the other federal circuits, the Supreme Court should grant the petition to resolve a well-recognized conflict on this constitutional issue.

CONCLUSION

The petition should be granted to review the decision below because it involves significant constitutional issues of procedural and substantive due process that stand in conflict among the circuits and it is inconsistent with recent Supreme Court precedent.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals
For the First Circuit

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Hector M. Laffitte, *U.S. DISTRICT JUDGE*]

Before
Campbell and Cyr, *Circuit Judges*,
and Fuste,* *District Judge*.

Thomas Richichi with whom *Kathryn E. Szmuszkovicz*, *Deborah K. Gunn*, *Beveridge & Diamond, P.C.* and *Jose Luis Novas-Dueno* were on brief for appellant.

Vannessa Ramirez, Assistant Solicitor General, Department of Justice, with whom *Jorge E. Perez Diaz*, Solicitor General, was on brief for appellees.

March 18, 1991

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*Of the District of Puerto Rico, sitting by designation.

CAMPBELL, *Circuit Judge*. This case arose out of a dispute over the development of a residential and tourist project in an area known as Vacia Talega in Loiza, Puerto Rico. Plaintiff-appellant PFZ Properties ("PFZ") filed a complaint under 42 U.S.C. § 1983, alleging that defendants Rene Alberto Rodriguez, Salvador Arana, and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE") had violated its constitutional rights to procedural and substantive due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a claim. PFZ filed a timely appeal. Because we agree with the district court that PFZ's complaint does not state a valid claim under § 1983, we affirm the dismissal.

I.

As this appeal follows the dismissal of the complaint under Rule 12(b) (6), we accept the factual averments of the complaint as true, and construe these facts in the light most favorable to the plaintiff's case.[1] *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

PFZ owns 1,358.65 cuerdas of land in Loiza, Puerto Rico in an area known as Vacia Talega and Pinones. In May, 1976, the Planning Board of Puerto Rico adopted a resolution approving a Preliminary Development Plan submitted by PFZ for portions of this parcel. According to the approved Plan, development was to proceed in two phases, the first section to include constructing 2,000 hotel rooms and 2,000 residential units on 106 cuerdas, the second to include 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas. From the beginning, matters did not go smoothly for PFZ. On June 14, 1976, the residents of Barrio Torrecilla Baja, Loiza, Puerto Rico, filed a petition in the Superior Court of Puerto Rico requesting reconsideration of the Planning Board's resolution approving the Preliminary Development Plan and alleging that the Board had failed to consider adequately the development's impact on the environment and the residents of the area.

[1] Plaintiff-appellant complains that, although purporting to evaluate the adequacy of the complaint under Fed. R. Civ. P. 12(b) (6), the district court did not limit its consideration to allegations contained in the pleadings. We need not address this contention, as we limit our own analysis to the allegations in the Amended Complaint. We conclude, wholly apart from factual allegations contained elsewhere in the briefs and in the record, that the plaintiff has failed to state a claim upon which relief can be granted.

The Superior Court affirmed the Board's resolution in September, 1977, and the Supreme Court of Puerto Rico denied review in January, 1978.

On August 19, 1977, the Planning Board extended the time during which PFZ was required to submit preliminary plans to ARPE for the development of Block 1 of the first section until one year after the Superior Court's decision became final, assuming that decision were in PFZ's favor. On August 24, 1978, PFZ submitted preliminary plans for the development of the entire first section to ARPE. In February, 1981, nearly three years later, the plans were approved by ARPE. By this time, the project had been scaled down somewhat — the first section was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units on 79.93 cuerdas.

On February 22, 1982, PFZ submitted construction drawings for site improvements for the subdivision works of Block 1 of the first section and preliminary project plans for the structures to be constructed on Block 2 of the first section. On March 24, ARPE returned the preliminary project plans to PFZ, stating that submission of the plans was premature and that, according to the 1981 ARPE Resolution, construction drawings for site improvements must be processed first. ARPE also explained that it had sent the site improvement drawings for Block 1 to its regional office in Carolina, Puerto Rico. There was apparently no communication between PFZ and ARPE for four years. PFZ inquired by letter about the status of the plans in January, 1986; however, ARPE did not answer the letter.

ARPE invited PFZ to attend a meeting in September, 1986 to give a presentation on the project to various agencies of the Commonwealth. During that meeting, the project was discussed, but neither the validity of the 1976 and 1981 Resolutions nor the sufficiency or timeliness of the filings was questioned.

In November, 1987, the PFZ engineers resubmitted the preliminary project plans to ARPE. The next month, Jack Katz, a PFZ officer, attended a meeting with Mr. Amadeo Francis, Special Advisor to the Governor, to discuss the project. On December 28, 1987, PFZ filed its original complaint in the United States District Court for the District

of Puerto Rico, alleging that ARPE's continued refusal to process the drawings and issue the permits constituted a violation of PFZ's right to due process and amounted to a taking without just compensation under the United States Constitution.[2] Defendants filed an answer to the complaint and a motion to dismiss.

On August 2, 1988, ARPE informed PFZ by letter that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. PFZ requested reconsideration of the decision. ARPE denied the request. PFZ also petitioned for review of ARPE's decision in Superior Court. This petition, along with its petition for certiorari to the Supreme Court of Puerto Rico, were denied. PFZ filed its Amended Complaint in federal district court on October 11, 1988, alleging that ARPE's failure and continued refusal to process the construction drawings have deprived PFZ of its rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. PFZ also alleged that the treatment afforded its project differed substantially from the treatment of others similarly situated, thereby violating PFZ's right to equal protection under the Fourteenth Amendment.

The district court held that the post-deprivation process afforded to PFZ under Puerto Rico law was constitutionally adequate. It also held that, given the absence of any allegations of racial animus, political discrimination, or fundamental procedural irregularity, PFZ had failed to state a claim for violation of its rights to due process or equal protection under the Fourteenth Amendment. The district court therefore dismissed the complaint.

II.

A. **Procedural Due Process**

In order to establish a procedural due process claim under § 1983, PFZ must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). With respect to the first requirement, PFZ argues that, once the Planning Board gave its approval of PFZ's project in 1976 and once ARPE adopted a resolution approving the project in February, 1981,

[2] The takings claim was not pursued in PFZ's Amended Complaint, *infra*.

PFZ had acquired a legitimate claim of entitlement to approval of the construction drawings and to issuance of a building permit. Although we think it far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law, we may assume, *arguendo*, that the facts alleged in the complaint are sufficient to establish such an interest.

Assuming that PFZ had a property interest in obtaining the construction permit, it was deprived of that interest when ARPE refused to process the construction drawings. This deprivation was "under color of state law" for the purposes of § 1983. We turn, therefore, to the adequacy of the process afforded PFZ. Under Puerto Rico law, PFZ was entitled to request reconsideration of the decision by ARPE and, if reconsideration was denied, to file a petition for review of ARPE's action in the Superior Court of Puerto Rico.[3] PFZ now argues that this post-deprivation remedy was inadequate — that PFZ was entitled to an administrative hearing before the denial by ARPE. We disagree.

PFZ does not contend that the project approval procedures established by Puerto Rico law and by ARPE's custom and practice violate the Due Process Clause of the federal Constitution. Rather, it alleges that ARPE illegally departed from Puerto Rico's prescribed procedures by failing to process the construction drawings. When a deprivation of property results from conduct of state officials violative of state law, the Supreme Court has held that failure to provide predeprivation process does not violate the Due Process Clause. *See Parratt* v. *Taylor*, 451 U.S. 527, 543 (1980). Indeed, it makes little sense to argue that ARPE had to afford the plaintiff a hearing before it illegally departed from its own procedures by refusing to process the construction drawings. The state is not required to anticipate such violations of its own constitutionally adequate procedures. To hold otherwise would convert every de-

[3] 23 L.P.R.A. § 72 provides as follows:

> Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the . . . Superior Court of Puerto Rico.

parture from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983. *See Creative Environments* v. *Estabrook*, 680 F.2d 822, 832 n.9 (stating that "where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . due process has been provided"), *cert. denied*, 459 U.S. 989 (1982).

As, therefore, a pre-deprivation hearing was not required to meet the demands of the Due Process Clause, the only question is whether the post-deprivation process available to PFZ was adequate. We hold that the combination of administrative and judicial remedies provided by Puerto Rico law is sufficient to meet the requirements of due process. Under Puerto Rico law, PFZ had the right to petition for reconsideration by ARPE and for review in the Superior Court. Although ARPE declined the request for reconsideration and the Superior Court denied the petition for review, PFZ had the opportunity to present its allegations of administrative error and misconduct before the relevant administrative and judicial bodies of the Commonwealth of Puerto Rico. That relief from the agency decision was denied does not affect the adequacy of the process provided. *See id.*

B. **Substantive Due Process**

In addition to its procedural due process claim, PFZ alleges that ARPE violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved construction drawings. This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. *See, e.g., Chongris* v. *Board of Appeals of Town of Andover*, 811 F.2d 36, 42-43 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Chiplin Enterprises* v. *City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983); *Creative Environments*, 680 F.2d at 829-30. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. *See Chiplin Enterprises*, 712 F.2d at 1528. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficently

keyed to any legitimate state interest' " *Committee of U.S. Citizens in Nicaragua* v. *Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted). *See Pittsley* v. *Werish*, No. 90-1372 (1st Cir. February 27, 1991); *see also Hoffman* v. *City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (applying a "rational basis" test to governmental action challenged under a substantive due process theory). PFZ's allegations concerning ARPE's treatment of its proposal simply do not make out a substantive due process violation under this standard.

PFZ's substantive due process claim is similar to a developer's claim rejected by this Court in *Chiplin Enterprises*. There the planning board, after granting preliminary approval to a development project, denied a building permit for the project. The developer filed suit in state court and successfully challenged the authority of the planning board to review the site plans. After obtaining the permit, the developer brought a § 1983 action in federal court alleging a violation of his substantive due process rights. This court rejected the claim, stating that "[a] mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." 712 F.2d at 1528.

We rejected another such claim in *Creative Environments* v. *Estabrook*. (T)here the planning board had refused to approve a developer's project based on its fear of the social and political effects the development might have on the community. Rejecting the developer's due process claim, the court explained that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." 680 F.2d at 832 n.9.

Consistent with the above, we hold that PFZ's allegations that ARPE officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution. See *Amsden* v. *Moran*, 904 F.2d 748, 757 (1st Cir. 1990) (noting that "even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process"), *cert. denied*, ___ U.S. ___, 111 S. Ct. 713 (1991). Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacia Talega project based on con-

siderations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label.

C. **Equal Protection**

PFZ's equal protection claim represents, in effect, recharacterization of its substantive due process claim. PFZ argues that ARPE's refusal to process the construction drawings "differ[ed] invidiously from the process and treatment accorded to drawings and plans of others similarly situated." In *Creative Environments*, we suggested in a footnote that an equal protection claim "may be presented in situations involving gross abuse of power, invidious discrimination or fundamentally unfair procedures." 680 F.2d at 832 n.9. PFZ, however, alleges no facts that would suggest discrimination based on an invidious classification such as race or sex, nor does it allege the type of egregious procedural irregularities or abuse of power mentioned by *Creative Environments* as conceivably rising to the level of a federal equal protection violation. Alleging only that ARPE treated its project differently from others under consideration, PFZ's equal protection claim represents nothing more than a claim that ARPE departed from its own procedures or those provided by Puerto Rico Law.

Again, we emphasize that, whether under a due process or equal protection theory, departures from administrative procedures established under state law or the denial of a permit based on reasons illegitimate under state law, do not normally amount to a violation of the developer's federal constitutional rights. As we stated in *Creative Environments*,

> [e]very appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

680 F.2d at 833. Absent allegations reflective of more fundamental discrimination, we agree with the district court that PFZ did not state a claim under the Equal Protection Clause of the Fourteenth Amendment.

III.

Accepting the factual allegations of the complaint as true and construing them in the light most favorable to plaintiff, we hold that the plaintiff did not state a federal claim.

Affirmed. Costs to appellees.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees

JUDGEMENT
Entered: March 18, 1991

This cause came on to be heard on appeal from the United States District Court for the of Puerto Rico, **and was argued by counsel.**

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGILIANO
Clerk.

[cc: Mr. Richichi and Ms. Ramirez]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., AL.,
Defendants, Appellees.

BEFORE
Campbell and Cyr, Circuit Judges,
and Fuste,* District Judge.

ORDER OF COURT
Entered: April 23, 1991

In its Petition for Rehearing, appellant PFZ Properties, Inc. argues that rehearing is warranted because the panel limited its consideration to the allegations contained in the amended complaint and did not take into account the additional factual allegations contained in the pretrial order. We note, however, that PFZ did not raise any such argument in its brief. Indeed, it argued that the district court *erred* in taking into consideration facts outside the pleadings (but contained in the pretrial order) in applying a motion to dismiss standard. Having failed to raise it in its brief, PFZ may not rely upon the argument in support of its petition for rehearing. *See e.g., United States* v. *Ferryman*, 897 F.2d 591 (1st Cir. 1990) (issue raised for the first time in petition for rehearing dismissed as not properly before the court); *Arajuo* v. *Woods Hole*, 693 F. 2d 1, 4 (1st Cir. 1982) (refusing to consider theory raised for the first time in petition for rehearing).

We note also that, in our review under 12(b) (6), we indulged all inferences in favor of PFZ, the nonmovant. For example, we assumed that ARPE had violated its own rules, that its procedures were irregular, and even that it had singled out PFZ for differential treatment. None of

the additional factual allegations in the pretrial statement add significantly to the facts taken as true in our opinion. thus, even if PFZ had raised the argument in a timely manner, the outcome of the case would not have been different.

The petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGILIANO
Clerk.

*Of the District of Puerto Rico, sitting by designation.

[cc: Mr. Richichi and Ms. Ramirez]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,
v.
RENE A. RODRIGUEZ, et al.,
Defendants.

CIVIL NO. 87-1915 HL

OPINION AND ORDER

This case concerns a dispute over a residential and tourist development project in an area known as Vacia Talega in Loiza, Puerto Rico. Plaintiff PFZ Properties, Inc. ("PFZ") brought the present action claiming that the Puerto rico Regulations and Permits Administration (hereinafter called by its Spanish acronym "ARPE") and its former administrator, Rene Alberto Rodriguez[1] , deliberately delayed and failed to process certain construction drawings for site improvements submitted by PFZ to ARPE in February 1982. PFZ brings this action under the Civil Rights Statute, 42 U.S.C. Section 1983, alleging that defendants have violated its procedural and substantive due process rights and equal protection of the laws. Defendants move to dismiss this action on various grounds. As a result of our conclusion, we only address the issue of whether PFZ has stated a cause of action under Section 1983.[2]

[1]Codefendant Rodriguez was the Acting Administrator of the Regulations and Permits Administration from March 1, 1987 until he was appointed Administrator on September 2, 1987. He held the position of Administrator until February 20, 1989. At the time of this lawsuit was filed, Rodriguez was the Administrator of ARPE. Since Rodriguez is no longer at ARPE, he has been replaced by Salvador Arana as the current Administrator of ARPE. Pursuant to Federal Rule of Civil Procedure 25(d), Salvador Arana automatically shall be substituted as a party in his official capacity as Administrator of ARPE. However, Rodriguez shall remain as a defendant in his individual capacity.

[2] Defandants also contend in their motion to dismiss that the action is time barred and that the Eleventh Amendment immunity bars this action. We find that these arguments are without merit and they will not be addressed. Thus, the Court only addresses the issue of whether PFZ has stated a cause of action. Since the Court concludes that PFZ does not have a cause of action under Section 1983, the issue of qualified immunity raised in defendants' motion for summary judgment need not be discussed. Likewise, there is no need to rule on the executive privilege raised by defendants when PFZ sought to depose two Governor's aides. *See* Motion to Alter or Amend Order and Request for Stay of Proceedings, and plaintiff's Opposition, Docket numbers 61 and 63.

I. FACTS

In deciding defendants' motion to dismiss, the Court accepts the allegations in the amended complaint as true and views them in the light most favorable to plaintiff PFZ. *SCHEUER* v. *RHODES*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *MORALES BORRERO* v. *LOPEZ FELICIANO*, 710 F. Supp. 32, 33 (D.P.R. 1989).

Since 1960, PFZ owns 1,358,65 "cuerdas"[3] in Vacia Talega. Some years after its purchase of the land, PFZ applied to the Puerto Rico Planning Board[4] to development the land into a 4,000-unit residential and tourist complex. Following extensive review and hearings, the Planning Board finally approved PFZ's project on May 14, 1976 ("the 1976 Planning Board Resolution").[5]

On August 24, 1978, PFZ timely submitted to ARPE plans for the internal preliminary development of blocks for the first section of the project, as required by the 1976 Planning Board Resolution. On February 24, 1981, ARPE approved the plans for the first section ("the 1981 ARPE Resolution").

On February 22, 1982, PFZ timely submitted to ARPE construction drawings for site improvements for the subdivision works of block 2 of

[3] A "cuerda" is a spanish measure equivalent to 0.97 acre. VELAZQUEZ, *Diccionario de los Idiomas Ingles y Español* 193 (1973); CULEBRAS ENTERPRISES CORP. v. RIVERA RIOS, 813 F.2d 506, 508 (1st Cir. 1987).

[4] The Puerto Rico Planning Board was created for the general purpose of "guiding the integral development of Puerto Rico" that will best promote the general welfare of the present and future inhabitants. The Planning Board is responsible for setting policies in the areas of development, distribution of population, use of the land and other natural conditions in Puerto Rico. 23 L.P.R.A. sec. 62c.

[5] The 1976 Planning Board Resolution approved the development project in two phases. The first section would create 2,000 hotel rooms and 2,000 residential units on 106 cuerdas. The second section would develop 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas.

The Puerto Rico Superior Court upheld the 1976 Planning Board Resolution against a petition filed by local residents requesting reconsideration of the 1976 Planning Board Resolution on the ground that the Planning Board did not adequately consider the development's impact on the environment and the residents living in the area. The Puerto Rico Supreme Court declined to exercise appellate jurisdiction over the resident'sappeal on January 4, 1978.

the first section ("the construction drawings"), as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution[6]. The construction drawings were accompanied by a letter from the firm of engineers, architects and planners engaged by PFZ to develop Vacia Talega. The letter informed ARPE that it was impossible for PFZ to present the final construction plans for the off-site works because the endorsements of Aqueduct and Sewer Authority and the Electric Energy Authority were not received until November 3, 1981 and January 14, 1982, respectively.

In order to facilitate the processing of the project, PFZ also submitted the preliminary project plans for the structures to be constructed in block 2 of the first section ("the preliminary project plans") for ARPE's comments which were not required at that stage of the agency process. However, ARPE returned the preliminary project plans because they were premature and not in compliance with the 1981 ARPE Resolution, which established that the construction drawings for site improvements be processed first. ARPE also informed PFZ that it had sent the construction drawings to its Regional Office in Carolina, Puerto Rico.

On January 27, 1986, the PFZ engineers wrote to ARPE to inquire about the status of the construction drawings. On February 19, 1986 and September 9, 1986, ARPE held meetings to discuss the project with other Commonwealth agencies. PFZ and its engineers attended the September 9th meeting. At the meeting no one directly or indirectly questioned the validity and effectiveness of the 1976 Planning Board Resolution or the 1981 ARPE Resolution nor the timeliness of the filing of PFZ's construction drawings.

Sometime between the first and second ARPE meetings, two senators had proposed a bill to incorporate the Vacia Talega area as part of the Commonwealth forest system. The bill proposed to conserve for

[6] ARPE "shall issue the corresponding permit based on the compliance with the regulation provided in section 42a of this title and in the certificate submitted by said engineer or architect, and shall file a copy of said permit together with the plans and other documents, required in accordance with the regulation provided in sections 42a-42h of this title." 23 L.P.R.A. sec. 42c. It shall also have the powers "to investigate all matters relative to the transaction or granting of said permit ... and may take such administrative or judicial action as may correspond." *Id.*

scientific, ecological and passive recreation purposes the Vacia Talega area, an area known for its mangrove-rich lands.

On February 26, 1987, the former administrator of ARPE, Lionel Matta-Garcia, wrote to PFZ's engineers informing them that because a considerable length of time had lapsed from the original approval of the project (October, 1970), it was necessary to receive updated comments from the government agencies. The letter also stated that it considered the construction plans as preliminary because they lacked basic details about the urbanization works to serve the project. The letter granted PFZ a year from the date of the letter to submit final construction plans. Matta-Garcia warned PFZ that if this deadline was not complied with, then the project would be dismissed.

PFZ claims it never received this letter of February 26, 1987. PFZ points out that the letter was signed by Matta-Garcia two days before he retired and that his subordinate and incoming administrator, codefendant Rodriguez, did not forward the letter but had the letter filed in a secret file involving the Vacia Talega project.

On October 8, 1987, the PFZ engineers again wrote to ARPE requesting information regarding the processing of the project. ARPE never answered this letter.

In November and December of 1987, the local newspapers reported that sponsors of the bill to make Vacia Talega area a forest reserve, called on the Governor of Puerto Rico to freeze the PFZ project until the House could vote on the approved Senate bill. The newspapers also reported that the Governor was reevaluating public policy on the environmentally sensitive coastal area of Vacia Talega and that no permit decision would be made until a new public policy could be determined.

On November 27, 1987, PFZ's engineers resubmitted the returned preliminary project plans to ARPE. After a PFZ officer attended a December 9, 1987 meeting with the Special Advisor of the Governor to discuss the project, PFZ filed on December 28, 1987 this action.

On August 2, 1988, ARPE sent two letters to PFZ's engineers, one from the Assistant Administrator of ARPE's Area of Regional Operations and the other from Assistant Administrator in charge of ARPE's Program of Technical Revisions. In these two letters, PFZ was informed that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect because the preliminary project plans were not considered advanced plans. ARPE returned the preliminary project plans but the construction drawings were neither returned nor referred to in the letter. On August 17, 1988, PFZ's engineers immediately wrote a letter to ARPE requesting reconsideration of the decision and unequivocally informing ARPE that it had reviewed the wrong drawings. Two sets of drawings were submitted by PFZ--the construction drawings and the preliminary project plans. The latter were sent to aid ARPE technicians in their review of the construction drawings. ARPE, nevertheless, denied PFZ's request for reconsideration.

PFZ then requested review of the agency's decision before the Puerto Rico Superior Court. The Superior Court affirmed the ARPE's decision and PFZ sought further review before the Puerto Rico Supreme Court. The Supreme Court denied review.

PFZ alleges that ARPE deliberately delayed processing of the construction drawings and illegally refused to process construction drawings pursuant to Puerto Rico law, ARPE's regulations and practices. PFZ claims that defendants' deliberate actions have deprived PFZ of its constitutional rights to procedural and substantive due process and equal protection. PFZ seeks damages and a permanent injunction prohibiting defendants from refusing to process the construction drawings and the preliminary project plans and ordering defendants that the construction drawings and the preliminary project plans be processed. Defendants move to dismiss on the ground that the complaint fails to state a claim under Section 1983. For the reasons below, we grant the motion to dismiss.

II. PROCEDURAL DUE PROCESS

To establish a claim for deprivation of procedural due process under Section 1983, PFZ must allege that 1) it has a property interest and 2) defendants, acting under color of law, deprived plaintiff of that property interest without constitutionally adequate procedural process. LOGAN v. ZIMMERMAN BRUSH CO., 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265, 273 (1982). *See* CLEVELAND BD. OF

EDUCATION v. LOUDERMILL, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985); BOARD OF REGENTS v. ROTH, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548, 556-57 (1972).

Defendants argue that PFZ has failed to satisfy the first prong because PFZ cannot claim a property interest in a construction permit it has not yet received. Defendants contend that procedural due process is afforded only to persons who are enjoying a government benefit. Defendants contend that PFZ's application for a construction permit does not create a property interest in obtaining a construction permit and therefore they are not entitled to any type of process. PFZ claims, however, that it is reasonable to conclude that once it received the Planning Board's approval of its project in 1976 and ARPE's issuance of a formal resolution in 1981 that it had legitimate claim of entitlement to the government's approval of the construction drawings. Assuming that PFZ acquired a property interest in obtaining a construction permit for its project, PFZ does not show that it was deprived of adequate process.

The key issue in procedural due process was whether there was adequate process. Puerto Rico law afforded PFZ review of ARPE's denial to review PFZ's construction drawings. 23 L.P.R.A. sec. 72d[7].

[7]23 L.P.R.A. sec. 72d provides that:

> Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the San Juan Part of the Superior Court of Puerto Rico or any Part whose jurisdiction comprises the place where the project is located, within the term of thirty (30) days reckoning from the mailing date of the notice of denial of the petition for reconsideration.
>
> Once the petition for review is established, if the writ is issued, it shall be the duty of the Regulations and Permit Administration to remand to the court the record of the case within fifteen (15) calendar days following the isssuance of the writ.
>
> The review before the Superior Court shall be limited exclusively to issues of law.

The law provides for both agency and judicial review. PFZ had available the procedural remedy of requesting reconsideration of ARPE's denial to review PFZ's construction drawings. PFZ exercised that remedy in its letter of August 17, 1988. Although ARPE denied PFZ's request for reconsideration, the mere denial does not mean that PFZ was not afforded a remedy. PFZ also appealed ARPE's denial to the Puerto Rico Superior Court and the Superior Court affirmed the agency's decision. PFZ sought further review before the Puerto Rico Supreme Court and the Supreme Court denied review. Because PFZ had available both administrative and judicial remedies, which PFZ exercised, we cannot conclude that PFZ was deprived of a meaningful opportunity to be heard in violation of due process. *See* BELLO v. WALKER, 840 F.2d 1124, 1128 (3rd Cir. 1988); CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822, 829-30 (1st Cir. 1982). *See also* ROGERS v. OKIN, 738 F.2d 1 (1st Cir. 1984); ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983).

PFZ claims that it was entitled to have ARPE review the construction drawings and make comments. PFZ argues that if the construction drawings did not comport with the regulations then according to ARPE'S custom and practice, ARPE had to inform proponent of the project and give the proponent an opportunity to make changes. Although ARPE may not have afforded PFZ with the opportunity to make changes before the construction drawings were rejected pursuant to ARPE's custom and practice, the mere refusal to follow state law or agency custom does not give rise to a federal violation. In ROY, the court emphasized that where state courts are available to correct errors, "the mere fact the individual defendants may have refused to renew (plaintiff's) permit for reasons untenable under Maine law gives rise to no federal right". 712 F.2d at 1523. *See also* CHIPLIN ENTERPRISES, INC. v. CITY OF LEBANON, 712 F.2d 1524, 1526 (1st Cir. 1983) (a mere bad faith refusal does not constitute a due process violation where judicial review is available to correct the error). Like the plaintiff in ROY, PFZ received minimal due process in the form of reconsideration before the agency and appeal before the local courts. *Id.*

III. SUBSTANTIVE DUE PROCESS

The First Circuit has repeatedly found that controversies surrounding rejections of proposed land development projects and denials of permits does not amount to a federal constitutional violation. *See*

CHIPLIN ENTERPRISES INC. v. CITY OF LEBANON, 712 F.2d 1524 (1st Cir. 1983); ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983); CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822 (1st Cir. 1982). The Court has also held that even where state officials have clearly violated state law in the area of land planning or zoning, this action does not rise to the level of a constitutional deprivation. In order to establish a substantive due process claim involving a dispute between a developer and a state agency, the developer must show that there was racial animus, political discrimination, or fundamental procedural irregularity in the processing of the projects. CHIPLIN ENTERPRISES, 712 F.2d at 1528; ROY, 712 F.2d at 1523; CREATIVE ENVIRONMENTS, 680 F.2d at 833. *See* RASKIEWICZ v. TOWN OF NEW BOSTON, 754 F.2d 38, 44 (1st. Cir. 1985) ("federal courts do not sit as a super zoning board or a zoning board of appeals"); STEEL HILL DEVELOPMENT v. TOWN OF SANBORNTORN, 469 F.2d 956, 960 (1st Cir. 1972) ("a court does not sit as a super zoning board with power to act *de novo*, but rather has, in the absence of alleged racial or economic discrimination..., a limited role of review").

PFZ alleges that ARPE violated its rights under substantive due process when ARPE arbitrarily, capriciously or illegally delayed and denied review of the construction drawings. PFZ further alleges that the handling of its project was tainted with fundamental procedural irregularities. PFZ specifically claims that defendants disregarded and concealed from PFZ the ARPE letter of February 1987. This letter was written by Matta-Garcia, the former administrator of ARPE, informing that its construction plans were considered preliminary and granting PFZ one year from the date of the letter to submit the final construction plans for the urbanization works. PFZ also claims that defendants conducted a sham review of the construction drawings.

PFZ's claim is more similar to the claim rejected in CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822 (1st Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (3rd Cir. 1982). In CREATIVE ENVIRONMENTS, INC., a real estate developer claimed that its residential housing development project was improperly rejected by the local planning board. The planning board rejected the project because it feared the social effects the development

may have on the community and the voter influence the incoming homeowners' association may pose. The developer argued that the planning board engaged in misapplication of state law. The first Circuit stated that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." *Id.* at 832 n.9. The Court also stated that:

> (e)very appeal by a disappointed developer from an adverse ruling by a local...planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under under section 1983. As has been often stated, 'the violation of a state statute does automatically gives rise to a violation of rights secured by the Constitution.' (citation omitted).

Id. at 833

The First circuit reemphasized these principles in CHIPLIN ENTERPRISES, INC. v. CITY OF LEBANON, 712 F.2d 1524 (1st Cir. 1983) and in ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983). In CHIPLIN ENTERPRISES, the planning board had granted preliminary approval of a project but later denied a building permit for the project. The developer filed suit in state court and successfully obtained a permit on the ground that the planning board had no authority to review site plans for "multi-family dwelling units." The developer then filed a Section 1983 action alleging damages for the five-year delay in obtaining the permit. The First Circuit found that " (a) mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." *Id.* R 1528

In ROY, the court held that plaintiff has stated a constitutional claim when he had been denied a renewal of his pool hall license because

defendants had allegedly disregarded a state court order requiring the issuance of the license. The Court stated that if the case had involved a denial of a license based on improper reasons, such a claim would not have constituted a constitutional violation. 712 F.2d at 1523.

Based on First Circuit precedent, PFZ's allegations that ARPE officials have deliberately failed to comply with its own agency regulations or practices in the review of PFZ's construction drawings are not enough to state substantive due process claim because claims of outright violations of state law or regulations in the area of land planning or zoning are not considered constitutional violations. Similar to this case, in CLOUTIER v. TOWN OF EPPING, 714 F.2d 1184 (1st Cir. 1983), the plaintiff alleged various unlawful action such "abuse of process, perjury, failing to come forward with material evidence, and giving false information to a state agency about the plaintiffs". *Id.* at 1189. Nevertheless, said action was not considered egregious behavior to amount to a constitutional violation under due process.

PFZ also alleges that the review of the project has been tainted with fundamental procedural irregularities. PFZ claims that once ARPE issued the 1976 Resolution, approving PFZ's preliminary development plans for the first scection, ARPE had neither the authority nor the discretion to refuse to review PFZ's construction drawings, but rather ARPE was only required to make a technical review of the construction drawings. If the construction drawings did not meet the technical requirements, ARPE would inform the developer so that the developer could make the necessary revisions. After this "back and forth" process is completed and the construction drawings are in compliance with ARPE's resolution and regulations, ARPE must issue a construction permit.

We recognize that ARPE may have engaged in delaying tactics and may have intentionally denied the Vacia Talega project. However, it is not our place to adjudicate these claims. Federal courts cannot review disagreements a developer has with the handling of its project by an agency even though agency has engaged in delays and intentional violations. CHIPLIN ENTERPRISES, 712 F.2d at 1528; ROY, 712 F.2d at 1523; CREATIVE ENVIRONMENTS, 680 F.2d at 833. However, developers are not left without a remedy because state courts are available to redress any wrongs committed by state planning agencies. It must be emphasized that this is a type of dispute which con-

cerns local interest (i.e. environment and development of the island). PFZ may have a claim under local law which it can pursue in that forum. *See* CREATIVE ENVIRONMENTS, 680 F.2d at 833; ROY, 712 F.2d at 1523.

IV. EQUAL PROTECTION

Many of the arguments made by PFZ under substantive due process are the same for its equal protection claim. PFZ's principle argument is that ARPE engaged in "illegal political considerations." In support of this contention, PFZ relies on the First Circuit case of CORDECO DEVELOPMENT CORP. v. SANTIAGO VAZQUEZ, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978, 97 S.Ct 488, 50 L.Ed.2d 586 (1976). However, we find that this case is inapposite. CORDECO involved a litigant who alleged that government officials acted maliciously and with illegitimate "political" or personal motives in delaying and denying a permit to extract sand. The circuit court affirmed the trial court's ruling that defendants denied the permit in order to favor plaintiff's competitor who was a family with close political ties to the incumbent administration. In that case, there was a constitutional violation because officials had adversely treated a particular permit applicant due to partisan political considerations, even though the purposeful discrimination was not based on invidious classification.

On the contrary, PFZ has not alleged facts that defendants have succumbed to political pressure from a rival developer. Nor does PFZ allege that the reason for the defendants' action was a result of partisan politics.[8] This case also does not involve discrimination based on invidious classification (i.e. race or religion); this is not a case where PFZ was singled our for disparate treatment anent other similarly situated developers. *See* LECLAIR v. SAUNDERS, 627 F.2d 606 (2d. Cir. 1980). The Governor's remarks in the press that his views on the development of Vacia Talega had changed and that he now plans to preserve the area in its natural state, cannot be characterized as imper-

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[8] PFZ's Counsel was asked, at the Pretrial Conference, whether it was claiming that denial of permit was because it supported a rival political party. PFZ's counsel responded that was not the case. *See* Transcript of Pretrial and Settlement Conference of December 8, 1989.

missible, even if made with a view to appease voters, rather than for truly enviromental reasons. We note that under Puerto Rico law, the Governor of Puerto Rico has the authority to revoke development policies created by the Planning Board. 23 L.P.R.A. sec. 62j(6). Consequently, PFZ has failed to state a cause of action for violation of equal protection of the laws.

WHEREFORE, for the foregoing reasons, defendants' motion to dismiss is hereby **GRANTED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,		
Plaintiff,		
v.	:	CIVIL NO. 87-1915 HL
RENE A. RODRIGUEZ, et al.,		
Defendants.		

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JUDGMENT

The Court having entered an Opinion and Order granting defendants' Motion to Dismiss on this same date, it is hereby ORDERED AND ADJUDGED that this case be **dismissed**.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.
Plaintiff,
v.
RENE ALBERTO RODRIGUEZ, et al.,
Defendants.

CIVIL NO. 87-1915 HL

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ORDER

Plaintiff moves the Court to reconsider its March 9, 1990 opinion and order granting defendants' motion to dismiss and dismissing plaintiff's complaint. Defendants have not opposed this motion. Because plaintiff's motion for reconsideration is basically a rehash of the arguments raised in its lenghty oppositions to defendants' motion to dismiss and motion for summary judgment, the Court addresses only plaintiff's first and last grounds for reconsideration.

As to plaintiff's first point for reconsideration, plaintiff contends that this Court erred in concluding that plaintiff was not deprived of a meaningful opportunity to be heard in violation of due process because plaintiff had available both administrative and judicial remedies. Plaintiff asserts that the availability of state administrative and court remedies does not bar due process claims under 42 U.S.C. section 1983. Plaintiff refers to MILLER v. TOWN OF HULL, 878 F.2d 523, 529 (1st Cir. 1989) to support this argument. The Court was fully aware of the MILLER case when defendants' dispositive motions were under advisement but nevertheless concluded then that the MILLER opinion had no bearing on this case. In MILLER, the First Circuit rejected the argument that exhaustion of state remedies is required in order to state a Section 1983 claim. Our opinion and order did not state or infer that plaintiff had to exhaust their local remedies as a prerequisite in alleging a Section 1983 cause of action. Plaintiff's due process was dismissed on the merits because Puerto Rico law provided adequate process by affording plaintiff various reviews of defendants' administrative decisions. As such, the MILLER case does not alter our position on plaintiff's due process claim.

Plaintiff's last point for reconsideration is that this Court should have allowed it to take the depositions of two Governor's aides before rendering a decision on the merits of its case. We disagree. We do not think that the depositions of these aides would have impacted on the results of this case. Moreover, in deciding the motion to dismiss, plaintiff's allegations in the complaint were accepted as true and every inference was read in the light most favorable to plaintiff. *See* Opinion and Order of March 9, 1990 at 2.

WHEREFORE, plaintiff's motion for reconsideration or in the alternative for stay of judgment is hereby **DENIED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, June 15, 1990

HECTOR M. LAFFITTE
U.S. District Judge.

23 L.P.R.A. sec. 72d

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the San Juan Part of the Superior Court of Puerto Rico or any Part whose jurisdiction comprises the place where the project is located, within the term of thirty (30) days reckoning from the mailing date of the notice of denial of the petition for reconsideration.

Once the petition for review is established, if the writ is issued, it shall be the duty of the Regulations and Permit Administration to remand to the court the record of the case within fifteen (15) calendar days following the issuance of the writ.

The review before the Superior Court shall be limited exclusively to issues of law.